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7 JOSE M. PAVON,,
8 Plaintiff,
9 v.
10 UPS and TEAMST
11 Defendants.
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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

* * *

2:12-cv-00928-JCM-NJK

**REPORT & RECOMMENDATION
OF UNITED STATES
MAGISTRATE JUDGE**

13 Before the Court are the Plaintiff's Motion to Enforce Settlement (#40) and the
14 Defendant UPS's Cross-Motion to Enforce Settlement (#43). The Court has considered the
15 Plaintiff's Motion (#40), the Defendant's Motion (#43), the Defendant's Response (#40), the
16 Plaintiff's Reply (#45), and the minutes and proceedings from the December 13, 2012, Early
17 Neutral Evaluation.

I. BACKGROUND

19 || A. Factual Background

20 The Plaintiff has been an employee of the Defendant UPS since 2003. By 2010, he was
21 working as a sorter. Docket No. 40. While working at that position, according to the Plaintiff, he
22 was verbally abused by fellow employees for, among other things, his accent. *Id.* The Plaintiff
23 states that he complained about his co-workers' behavior on numerous occasions in writing, but
24 his complaints were ignored. *Id.* Then, after one particular incident in which one of the Plaintiff's
25 co-workers was allegedly screaming and hitting bins, the Plaintiff was demoted to a bagger and
26 loader. *Id.* His co-workers, on the other hand, whom the Plaintiff believes had less seniority than
27 he did at the time, were assigned to preferable sorter positions. *Id.* The Plaintiff also asserts that
28 in 2011 and 2012 he was denied appropriate medical attention and documentation of certain
injuries. *Id.*

1 **B. Procedural Background**

2 On June 1, 2012, the Plaintiff filed a Complaint against UPS and the Union alleging
3 discrimination based on his national origin and gender, and retaliation for complaining that he
4 was discriminated against. Docket No 1. On September 19, 2012, pursuant to the Court-Based
5 Early Neutral Evaluation Program in the District of Nevada as outlined in LR 16-6, the Court
6 scheduled an Early Neutral Evaluation (“ENE”) session. Docket No. 26. The ENE session was
7 held on December 13, 2012, in front of Magistrate Judge Peggy A. Leen. Docket No. 35. During
8 the conference, the parties reached a settlement agreement and memorialized the terms on the
9 record in open court. Docket No. 36. The terms of the agreement were confidential and not
10 reduced to writing at that time. Docket No. 35.

11 **C. Settlement Agreement**

12 On December 13, 2012, once a settlement was reached, Magistrate Judge Leen stated the
13 essential terms of the agreement on the record in open court and allowed all the parties to
14 confirm that the terms she stated were correct. The record reflects that these terms were
15 confidential and the Plaintiff was not to discuss the agreement with his co-workers. The
16 memorialized essential terms of the agreement were stated as follows:

- 17 1. UPS and the Union were to provide the Plaintiff with a jointly-authored letter
18 advising him of his seniority dates. The Plaintiff has two seniority dates: his
19 company seniority date and his center seniority date. The company seniority date
20 is relevant for certain benefits including retirement, and his center seniority date
21 has different consequences. The letter was supposed to outline The Plaintiff's
22 seniority rights “so that [the Plaintiff] has a clear understanding of what his
23 seniority rights are and what they cover.”
- 24 2. UPS would place the Plaintiff back in the position he requested, which was a
25 small sort position.

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1 3. Once UPS and the Union complied with the first two terms, the Plaintiff would
 2 execute a release of all claims in favor of UPS and the Union. Then both parties
 3 would file a stipulation to dismiss the case. The release would cover anything that
 4 happened relating to the workplace up until the date that the agreement was
 5 signed. It would not release UPS or the Union from future allegations.

6 Finally, Magistrate Judge Leen made it clear to the Plaintiff that he may have to work
 7 with the co-workers he previously did not get along with and that the possibility existed that one
 8 of those people could be his supervisor in the future. Both parties agreed that these were the
 9 essential terms of the agreement and that they would comply accordingly.

10 **D. The Dispute**

11 Both parties have moved to enforce the settlement agreement. However, the parties
 12 dispute the terms of the agreement and whether there has been compliance.

13 1. Plaintiff's Position

14 The Plaintiff argues that Defendant UPS¹ has not adequately performed under the
 15 settlement agreement and is seeking to enforce what he believes is the agreement. According to
 16 the Plaintiff, the parties agreed that (1) the Defendant would provide the Plaintiff with a letter
 17 describing his seniority dates; (2) enforce the Plaintiff's seniority right in daily operations; and
 18 (3) return the Plaintiff to his position as a sorter. Once those terms were met, the Plaintiff agreed
 19 to sign a release and dismiss the case. Docket No. 40. The Plaintiff has refused to sign the
 20 release, however, because he believes he is not being treated according to his seniority.

21 Specifically, the Plaintiff alleges that he has had to work at bin-3 which is a less-senior
 22 bin; that his less-senior co-workers have gotten to work at bin-1 while he was at bin-3; that he
 23 has had to do work as a loader on a number of occasions; and that he has not been called into
 24 work for extra-hours, an operation he states is also supposed to be determined by seniority.

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 27 ¹The Union is not a part of this current dispute. The Plaintiff has filed a stipulation for
 28 dismissal as to the Union. Docket No. 42.

1 2. Defendant's Position

2 According to Defendant UPS, the agreement was to (1) provide the Plaintiff with a letter
 3 describing his seniority dates; and (2) return the Plaintiff to his position as a sorter. Docket No.
 4 43. Upon meeting those requirements, the Plaintiff would sign a release and agree to dismiss the
 5 case. *Id.* The Defendant does not specifically state whether enforcing the Plaintiff's seniority
 6 rights was part of the agreement, but argues that it has treated the Plaintiff according to his
 7 seniority and that the Plaintiff is "confused about his seniority rights." *Id.* Further, according to
 8 the Defendant, if the Plaintiff believes his seniority rights have been violated he can file a
 9 grievance, which he has, but he still must sign the release on this case. *Id.*

10 **II. DISCUSSION**

11 A. **Legal Standard**

12 The court has inherent authority under federal law to enforce a settlement agreement in an
 13 action pending before it. *Callie v. Near*, 829 F.2d 888, 890 (9th Cir.1987); *TNT Marketing, Inc.*
 14 *v. Agresti*, 796 F.2d 276, 278 (9th Cir.1986) (citations omitted); see also *Marks–Foreman v.*
 15 *Reporter Pub. Co.*, 12 F.Supp.2d 1089, 1092 (S.D.Cal.1998) (citations omitted). Assent to an
 16 agreement in open court constitutes a binding agreement to settle. *Henderson v. Yard House*
 17 *Glendale, LLC*, 456 F. App'x 701, 702 (9th Cir. 2011); citing *Doi v. Halekulani Corp.*, 276 F.3d
 18 1131, 1137-8, 1140 (9th Cir.2002).

19 A settlement agreement must meet two requirements to be enforced. *Fernandez v.*
 20 *Nevada*, 2012 WL 960907 (D. Nev. Feb. 9, 2012) *report and recommendation adopted*, 2012
 21 WL 960619 (D. Nev. Mar. 20, 2012). First, it must be a complete agreement. *Id.* citing *Callie*,
 22 829 F.2d at 890. Second, both parties or their authorized attorneys must agree to the terms of the
 23 settlement. *Id.* citing *Harrop v. Western Airlines, Inc.*, 550 F.2d 1143, 1144–45 (9th Cir.1977).
 24 Where material facts concerning the terms or existence of settlement agreement are disputed, the
 25 parties are entitled to an evidentiary hearing. *Callie*, 829 F.2d at 890.

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1 **B. Analysis**

2 1. Evidentiary Hearing

3 Although the parties agree that UPS must afford the Plaintiff his seniority rights, they
4 dispute whether providing those rights is a prerequisite to the Plaintiff signing the release.

5 Where material facts concerning the terms or existence of settlement agreement are
6 disputed, the parties are entitled to an evidentiary hearing. *Callie*, 829 F.2d at 890. However, the
7 Court may decide not to hold a hearing if neither party requests or indicates that a hearing is
8 necessary to settle disputed material facts. *Bank of the W. v. Great Falls Ltd. P'ship*, 2011 WL
9 5102244, *2 (D. Nev. Oct. 25, 2011).

10 Here, neither party has requested an evidentiary hearing. Additionally, the material terms
11 of the agreement were clearly stated by Magistrate Judge Leen for the record. According to the
12 binding settlement agreement made in open court, the Plaintiff will release UPS of all of its
13 alleged workplace violations occurring prior to the Plaintiff signing the release once UPS (a)
14 provided the Plaintiff with the letter, and (b) assigned the Plaintiff to a small sorter position.
15 Thus, because the parties agreed that the release would cover any workplace violations up to and
16 until the release was signed, it is clear that the parties did not agree to give UPS a free pass to
17 ignore the Plaintiff's seniority rights for the period of time between the ENE and the signing of
18 the release. UPS was indeed required to treat the Plaintiff according to his seniority rights prior to
19 the Plaintiff signing the release.² Accordingly, because the material facts of the agreement are
20 clear and neither party has requested an evidentiary hearing, the undersigned Magistrate Judge
21 recommends that the Court decline to hold such a hearing.

22 2. Seniority Rights and Required Letter

23 The parties disagree over whether the Plaintiff's seniority entitles him to certain
24 privileges. However, the Court need not and does not make a finding as to whether UPS has
25 properly provided the Plaintiff with his seniority rights since the ENE. The settlement agreement

27 2The Court does not at this time make a finding as to whether UPS has or has not treated
28 the Plaintiff according to his seniority.

1 did not concern which rights the Plaintiff's seniority afforded him. Rather, it only required that
2 he be afforded his seniority rights, whatever those may be. Accordingly, the undersigned
3 Magistrate Judge recommends that the Court deny the Plaintiff's request that the Court enforce
4 the seniority rights to which he believes he is entitled and only require UPS to provide the rights
5 to which he is actually entitled. As mentioned before, the Court makes no finding as to whether
6 UPS has or had not denied the Plaintiff any of his seniority rights.

7 The lack of clarity concerning the Plaintiff's rights is due in large part to the letter the
8 Defendants provided the Plaintiff. The Defendants were required to provided the Plaintiff with a
9 letter outlining the Plaintiff's seniority rights "so that [the Plaintiff] has a clear understanding of
10 what his seniority rights are and what they cover." This indicates that the parties were in
11 agreement that the Plaintiff has seniority rights generally and that the Defendants would explain
12 to the Plaintiff what those rights are in the letter it would provide.

13 Having reviewed the letter, however, the Court finds that it fails to provide the Plaintiff
14 with a clear understanding of what his seniority rights are and what they cover. See Exhibit A,
15 attached to Docket No. 43. Concerning the Plaintiff's company seniority, the letter states that it
16 "determines [the Plaintiff's] eligibility for various Company fringe benefits including: Eligibility
17 and amounts of pension benefits [and] Number of vacation days." *Id.* (formatting removed). The
18 letter goes on to state that the Plaintiff may set up an appointment with a pension specialist to
19 learn about his pension benefits. *Id.* The letter does not explain what other "various fringe
20 benefits" the Plaintiff is entitled to, what they cover, or that the Defendants will be providing that
21 information in writing. As for the Plaintiff's center seniority, the letter simply states that it
22 "determines [the Plaintiff's] seniority for purposes of job bidding and layoffs." This brief
23 sentence does not provide a clear picture of what the Plaintiff's rights are, nor what they cover.

24 The clarity of the letter is of chief importance because its entire purpose was to explain to
25 the Plaintiff the coverage of his seniority rights. Indeed, according to UPS, the present dispute is
26 due to the fact that the Plaintiff is confused about his seniority rights. However, UPS had an
27 obligation under the agreed-upon terms to affirmatively inform the Plaintiff of his seniority
28 rights. UPS did not meet this obligation in its letter by simply telling the Plaintiff that his

1 seniority concerns broad non-inclusive types of benefits and that he can contact a pension
 2 specialist if he so chooses. Thus, considering the letter's lack of inclusiveness, it is
 3 understandable that the Plaintiff is concerned about his bin assignment and extra-hour allotment.
 4 Accordingly, the Court finds that UPS was required to provide the Plaintiff with a letter which
 5 makes clear what his seniority rights are and what they cover, and that the letter should be
 6 inclusive. It is recommended that UPS provide citations to any and all agreements and
 7 handbooks which determine the Plaintiff's benefits to ensure that it is comprehensive.

8 3. Findings

9 The Court, through its inherent authority under federal law to enforce a settlement
 10 agreement in an action pending before it, should enforce the settlement agreement the parties
 11 entered into in open court before Magistrate Judge Leen. See *Callie*, 829 F.2d at 890. The
 12 agreement requires UPS to provide the Plaintiff with a letter which makes clear what his
 13 seniority rights are and what they cover. UPS must provide the Plaintiff his seniority rights,
 14 whatever those may be, and deny the Plaintiff's request for any seniority rights to which he is not
 15 actually entitled. The Court also finds that once UPS has provided the Plaintiff with a proper
 16 letter and his appropriate seniority rights, the Plaintiff must sign the release.

17 Finally, the Court finds that the Plaintiff's request for costs, fees, or other monetary
 18 sanction, should be denied. Although the district court's enforcement power includes authority to
 19 award damages for failure to comply with the settlement agreement, *Hobbs & Co. v. American*
 20 *Investors Management, Inc.*, 576 F.2d 29, 33 & n. 7 (3d Cir.1978); "breach of the agreement
 21 entitles the nonbreaching party to specific performance or an award of damages, as appropriate."
 22 *TNT Mktg., Inc. v. Agresti*, 796 F.2d 276, 278 (9th Cir. 1986) (emphasis added), citing *Village of*
 23 *Kaktovik v. Watt*, 689 F.2d 222, 230 (D.C.Cir.1982).

24 Here, UPS did attempt to comply with the settlement agreement by providing the Plaintiff
 25 with a letter, even though it was insufficient, and there is no indication that the vagueness of the
 26 letter constitutes bad faith. Further, the undersigned Magistrate Judge recommends specific
 27 performance. Thus, the undersigned Magistrate Judge finds that an award of damages is not
 28 appropriate.

1 **III. RECOMMENDATION**

2 **IT IS THE RECOMMENDATION** of the undersigned Magistrate Judge that the
3 settlement agreement be **ENFORCED ACCORDING TO THE TERMS ENTERED INTO**
4 **IN OPEN COURT.**

5 **IT IS FURTHER RECOMMENDED** that the Defendant be required in provide the
6 Plaintiff with a letter which clearly describes his seniority rights in accordance with the
7 settlement agreement.

8 **IT IS FURTHER RECOMMENDED** that the Plaintiff's Motion (#40) be **DENIED in**
9 **part and GRANTED in part.**

10 **IT IS RECOMMENDED** that the Plaintiff's request that the Court grant him
11 specific privileges which may not be part of his seniority rights be **DENIED**, and
12 **IT IS RECOMMENDED** that the Plaintiff's request that the Court grant him his
13 seniority rights generally before he signs the release be **GRANTED** in that those
14 rights should be clarified for the Plaintiff in a letter provided by the Defendants.

15 **IT IS RECOMMENDED** that the Plaintiff's request for monetary damages be
16 **DENIED**.

17 **FINALLY, IT IS RECOMMENDED** that the Defendant's Motion (#43) be **DENIED**.

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19 DATED this 17th day of May, 2013.

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23 NANCY J. KOPPE
24 United States Magistrate Judge
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NOTICE

Pursuant to Local Rule IB 3-2 [former LR 510-2] any objection to this Report and Recommendation must be in writing and filed with the Clerk of the Court within (14) days after service of this Notice. The Supreme Court has held that the courts of appeal may determine that an appeal has been waived due to the failure to file objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985), *reh'g denied*, 474 U.S. 1111 (1986). This Circuit has also held that (1) failure to file objections within the specified time and (2) failure to properly address and brief the objectionable issues waives the right to appeal the District Court's order and/or appeal factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).